

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054**

In the Matter of)	
)	
Promoting Efficient Use of Spectrum)	
Through Elimination of Barriers to the)	WT Docket No. 00-230
Development of Secondary Markets)	

**REPLY COMMENTS OF
EL PASO GLOBAL NETWORKS COMPANY**

El Paso Global Networks Company (“El Paso Global”), by its undersigned counsel, submits these reply comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

El Paso Global, an emerging market maker in the telecommunications industry, enthusiastically supports the Commission’s goal of encouraging the development of a secondary market in spectrum. With an affiliate which has, for some time now, been actively involved in the trading of energy and related products² and with its own experience in the trading of wireline bandwidth, El Paso Global recognizes the great potential of a secondary spectrum market to facilitate the efficient allocation of spectrum. Through its experience in commodities trading, El

¹ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, WT Docket No. 00-230 (Released November 27, 2000).

² As indicated in its initial comments, El Paso Global’s parent company, El Paso Corporation, through its subsidiary El Paso Merchant, LP (“El Paso Merchant”), has been a major player in the energy marketing and trading business. See Comments of El Paso Global Networks Company at page 2.

Paso Global has also gained an appreciation for the elements required for the development and efficient functioning of a secondary market. El Paso Global submits these reply comments to respond to certain concerns raised in the initial comment round and also to provide support for certain proposals that El Paso Global believes could facilitate the expeditious development of a secondary spectrum market.

El Paso Global does not believe that protecting against spectrum interference is inconsistent with the development of a secondary spectrum market. Subject to such protections, however, it does disagree with those who would advocate the continuation of use restrictions. El Paso Global also restates its view that the current transfer of control regime is simply too rigid and will, if applied in this context, most assuredly stunt the growth of a secondary spectrum market. El Paso Global also disagrees with those who would advocate the joint accountability of licensees and lessees for violation of the Commission's rules. As indicated in its initial comments, El Paso Global believes that participants in a secondary market should be able to discharge responsibility for compliance consistently with the workings of an effective market. Specifically, they should be able to contractually require compliance of downstream users with the Act and Commission rules and be able to rely upon those contractual requirements. In the same vein, El Paso agrees with Enron Corp's ("Enron") suggestion that the Commission should encourage the development of standardized master agreements for use in secondary spectrum market transactions. Finally, El Paso supports Enron's proposal that the Commission consider implementing a pilot program of limited duration as an initial step in a pre-determined plan to implement the rules and rule changes that will be required to allow the development of a secondary spectrum market.

II. DISCUSSION

A. Promotion of a Secondary Spectrum Market is in the Public Interest

1. Protecting Against Interference is Not Inconsistent with the Notion of Developing a Robust Secondary Spectrum Market

Protecting against interference is not inconsistent with developing a robust secondary spectrum market.³ Quite to the contrary, the development of a secondary market in spectrum absolutely requires a firm commitment to continuing protection against interference. Would-be participants in a secondary market have a particular interest in knowing that spectrum leased and sub-leased in the secondary market will be interference-free and otherwise reliable. The absence of some level of comfort on the issue would surely dampen participation in a secondary spectrum market. As discussed in further detail below and as was discussed in El Paso Global's initial comments, the Commission can encourage adherence to its interference rules in a secondary market context by allowing licensees and sub-lessors to rely upon their downstream lessees' contractual commitments to comply with such rules and by permitting these lessees to be held responsible for a failure to do so.

2. Continuing Limitations on Use Will Undermine the Fungibility of Spectrum Thereby Hampering the Ability of a Secondary Spectrum Market to Develop and Flourish

El Paso Global emphatically disagrees with those commenters like Entergy, Cinergy and KCPL that argue for the continuation, generally, of use restrictions. Subject to such restrictions as may be necessary to protect against interference, restrictions on the use of spectrum are inconsistent with the goal of developing a secondary spectrum market insofar as such restrictions

³ See Comments of 37 Concerned Economists; Comments of Enron Corp. *But see* Comments of Entergy Corporation ("Entergy"); Comments of Cinergy Corp. ("Cinergy"); Comments of Kansas City Power & Light Co. ("KCPL").

inherently and necessarily limit spectrum's fungibility. El Paso Global agrees with Enron that use restrictions "prevent spectrum from flowing freely and most efficiently"⁴ – precisely the opposite of the result that the FCC is here trying to achieve.

3. The Current Transfer of Control Regime is Too Rigid for a Secondary Market Context

El Paso Global agrees with those commenters, including Enron,⁵ which advocate the removal of prior approval requirements for spectrum transfers in the secondary market context. As the Commission has recognized, in order to encourage the development of a secondary spectrum market, the Commission must afford would-be participants as much flexibility as possible in entering into secondary market transactions. Among other things, this means that the Commission should minimize, to the extent possible consistent with statutory requirements, the administrative delay and costs inherent therein. Rigid application of the *Intermountain Microwave*⁶ standard -- with its narrow focus on close, day-to-day control of particular operating facilities and its prior approval requirements based thereupon -- would clearly be inconsistent with that goal. El Paso Global, in its initial comments, set forth for the Commission three alternative approaches to contending with the requirements of Section 310(d) in the secondary spectrum market context -- any one of which, El Paso Global submits, the FCC has authority to implement.⁷

⁴ See Comments of Enron Corp at page 12.

⁵ See Comments of Enron Corp at page 15.

⁶ *Intermountain Microwave*, 12 FCC 2d 599, 22 RR 983 (1963).

⁷ El Paso Global believes that licensees should be deemed to retain control of spectrum for Section 310(d) purposes if they contractually require lessees to abide by the Act and Commission rules and retain full authority to reclaim the spectrum in the event of a breach of such

B. Compliance with the Act and Commission Rules

1. Holding Licensees and Lessees Jointly Accountable for Each Other's Violations Will Undermine the Development of a Secondary Spectrum Market

El Paso Global disagrees with the notion that licensees and lessors should be held responsible for their downstream lessees' failure to comply with the Act and Commission rules.⁸ As El Paso Global argued in its initial comments, such an approach would make the transaction costs of entering into secondary market transactions too high. Moreover, enforcement of the Commission's rules in a way that affords actual users of spectrum the rights but not the responsibilities inherent in such use could actually undermine the Commission's goal of creating an efficiently functioning secondary spectrum market.

Instead, licensees and sub-lessors should be allowed to contractually require their downstream lessees to comply with the Act and Commission rules and be permitted, in the first instance, to rely upon those contractual obligations.⁹ Such contractual obligations, coupled with

obligations. Should the Commission, nevertheless, determine that some leasing arrangements do trigger Section 310(d), then El Paso Global believes that the Commission should either issue a blanket determination that transactions in the secondary market are in the public interest or, alternatively, simply forbear from applying Section 310(d) to secondary market transactions. *See* Comments of El Paso Global Networks Company at pages 11-12.

⁸ *See* Comments of Entergy Corporation; Comments of Cinergy Corp.; Comments of Kansas City Power & Light Co. As El Paso Global argued in its initial comments, though, to the extent that the Commission determines to hold a licensee or sub-lessor directly responsible for a violation of the Act or its rules by its downstream lessee, such licensee or sub-lessor should be afforded reasonable notice and an opportunity to cure the violation before any punitive Commission action is taken. Additionally, in those instances in which a licensee or sub-lessor is or becomes aware of a violation of the Act or the Commission's rules and acts to cure such violation, the Commission should be prepared to rule with expedition on any contractual disputes arising therefrom. *See* Comments of El Paso Global Networks Company at pages 6-7.

⁹ As to sub-lessors, Enron took the position that all intermediaries which merely trade in spectrum without transmitting on it must be protected in some way from the failure of a licensee or transmitting user to comply with FCC rules. *See* Comments of Enron Corp at pages 19-20. El

meaningful remedies for breach, should help to deter the non-compliance with FCC regulations that Entergy, KCPL and Cinergy worry will result as the relationship between the actual user and the FCC becomes more attenuated.¹⁰

2. The Commission Should Encourage Development of Standardized Master Agreements

El Paso Global agrees with Enron that the Commission should encourage the development and use of private-sector developed standardized agreements under which would-be secondary market participants could allocate responsibility for compliance and other obligations consistently with the realities of the private market. Like Enron, El Paso Global has some experience with the use of standardized agreements in a commodity trading context. Specifically, El Paso Global uses a standardized agreement in its bandwidth trading transactions and El Paso Global's affiliate, El Paso Merchant, uses standardized master agreements in its trading of energy and related commodities. El Paso Global submits that standardized agreements, developed by spectrum industry participants and recognized by the FCC, would serve the multiple purposes of allowing the appropriate allocation of risks and responsibilities in secondary market transactions, reducing the need for close regulatory oversight, and facilitating "spot" and other transactions in the secondary market by cutting down on negotiation delays.

Paso Global agrees that exposing these parties to the risk of regulatory compliance would increase their cost and result in a disincentive to participate in the secondary market. Accordingly, if this approach is otherwise consistent with the FCC's statutory obligations, then El Paso Global wholeheartedly supports the proposal.

¹⁰ See Comments of Entergy Corporation; Comments of Cinergy Corp.; Comments of Kansas City Power & Light Co.

C. A Pilot Program May Be a Useful First Step Towards Implementation of a Secondary Spectrum Market So Long As It Does Not Result in Undue Delay in Implementing the Necessary Rule Changes That Will Make the Development of a Secondary Market Possible

A pilot program that is part of a pre-determined implementation program could be a valuable first step towards creation of the regulatory environment that will facilitate the development of a robust secondary spectrum market. El Paso Global agrees with Enron that “the creation of an efficient secondary market will require a major change in the FCC’s current approach to spectrum allocation, transfers and licensing.”¹¹ A realistic pilot program (*i.e.*, one that frees participants from unnecessary regulatory restraint in the ways that El Paso Global and other commenters have advocated throughout this proceeding) could give the Commission just the kind of real world practical information and/or answers that it might feel it needs before more wide-spread implementation of the rules and rule changes being considered in this NPRM. El Paso Global emphasizes, however, that any pilot program should be for a fixed duration and only the first step in a pre-set implementation plan under which the Commission would take the information learned in the pilot, translate it into the final rules and rule changes needed and proceed with all expedition to implement the proposals set forth in this NPRM, modified as necessary, on a wide-spread basis. In short, a pilot program should be implemented only if it will advance, not substitute for, the expeditious implementation of the rules and rule changes necessary for the development of a secondary spectrum market.

¹¹ See Comments of Enron Corp at page 22.

III. CONCLUSION

El Paso Global supports the Commission's goal of encouraging the increasing efficiency of spectrum use by facilitating the development of a secondary wireless market and applauds its efforts in this regard to date. El Paso Global submits that by implementing the proposals set forth in its NPRM, with the modifications suggested in El Paso Global's initial comments and herein, the Commission will be setting the stage for the development of a robust secondary spectrum market.

Respectfully submitted,

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March 12, 2001